SUPREME COURT, U.S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-831

JOSEPH GIORDANO, SAM GIORDANO and
JOSEPHINE GIORDANO,
Appellants,

v.

H. F. STUBBS, BOB E. L. HOPE, SUMMER-MINTER AND
ASSOCIATES, INC., and HUGH SUMMER,
Appellees.

On Appeal from the Supreme Court of Georgia

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants Joseph P. Giordano, Sam Giordano and Josephine Giordano, have filed a Notice of Appeal to review the judgments (in companion cases) of the Supreme Court of Georgia entered on September 27, 1971.

OPINIONS BELOW

The Opinions of the Supreme Court of Georgia, reported at 228 Ga. 75 and 228 Ga. 85 are set out in Appendix A hereto. The Order of the Superior Court of DeKalb County, unreported, is set out in Appendix B hereto.

GROUNDS OF JURISDICTION

This was an action instituted in the Superior Court of DeKalb County, Georgia for the purpose of setting aside a certain real estate foreclosure. The action was commenced in accordance with the Georgia Civil Practice Act and invoked the general equitable powers of the Court. Plaintiffs, holders of a second security deed to certain described real estate sought relief against the foreclosure, without notice, of a first security deed to the property. Under Georgia law, the effect of the foreclosure of a senior security interest in property is to destroy junior interests in the property. **Scott** [illegible]**isley**, 271 U.S. 636 (1925); see also the decision of the Court below, 228 Ga. 75.

Plaintiffs sought a declaration of the invalidity of the foreclosure on several state grounds and upon the federal ground that the foreclosure, if held vaid, in the circumstances of the case, would deprive them of their property without due process of law.

Both parties filed motions for summary judgment. These were denied by the Superior Court of DeKalb County on March 8, 1971. The Superior Court granted a certificate allowing an interlocutory appeal. See Appendix B.

The Supreme Court of Georgia filed its judgment and opinion on September 27, 1971 affirming the denial of plaintiffs' motion for summary judgment but reversing the denial of the motion for summary judgment filed on behalf of the defendants. The notice of appeal to this Court was filed in the Supreme Court of Georgia on December 22, 1971.

The complaint and this appeal call in question the validity of Georgia Laws 1935, page 381 (codified at Georgia Code Ann., § 37-611 and § 67-1506) which provides as follows:

"No sale of real estate under powers contained in mortgages, debt, deeds, or other lien contracts shall be valid unless the sale shall be advertised and conducted at the time and place and in the usual manner of Sheriff's sales in the county in which such real estate, or a part thereof, is located."

This Statute has been authoritatively construed by the Georgia courts as authorizing foreclosure with notice by publication to persons interested in the property, but without actual notice. See the opinion of the Court below at 228 Ga. 78, and cases cited. Plaintiffs contended in the courts below that a foreclosure without notice pursuant to such statute as so construed would deprive them of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution, and that the Statute as so construed was unconstitutional. This constitutional claim was rejected. Jurisdiction is conferred upon this Court by Title 28 U.S.C., § 1257 (2).

Jurisdiction of this Court is properly invoked by appeal. The case presents essentially the same questions that were presented to this court by appeal in **Mullane v. Central Hanover Bank & Trust Co.**, 339 U.S. 306, 94 L.ed 875 (1950). In that case, as in this, the question presented to the court for review was whether a state statute which authorized the destruction of valuable property rights with notice to affected parties by publication only could withstand a challenge based upon the Fourteenth Amendment to the United States Constitution. In addition, this court reviewed by writ of error **Miller v. Schoene**, 276 U.S. 272, 72 L.ed 568 (1928). That case dealt with the constitutionality under the Fourteenth Amendment of a State Statute authorizing the destruction of trees where considered to be necessary to prevent the spread of a certain disease. **Winters v. New York**, 333 U.S. 507, 92 L.ed 840 (1948), was a review by appeal of a challenge to a state obscenity statute under the Fourteenth Amendment to the United States Constitution.

QUESTIONS PRESENTED

1. Does a State Statute which authorizes the destruction of subordinate security interests in property by foreclosure of senior security interests without notice (other than by publication) violate the due process clause of the Fourteenth Amendment to the United States Constitution where the foreclosing party has actual knowledge of the existence of the subordinate security interests and of the names and addresses of the holders of such interests.

2. Where the holder of a first security interest in property has actual knowledge of the existence of a subordinate security interest in such property and of the names and addresses of the holders of such subordinate security interests and, despite such knowledge, forecloses without notice to the holders of the subordinate interest (other than by publication), and where the effect of such foreclosure under state law is to destroy the subordinate interest, does the state statute authorizing such procedure, as applied, deprive the holders of the subordinate security interest of their property without due process of law?

STATEMENT OF THE CASE

This case involves certain real estate in Gwinnett County, Georgia, with a value of approximately $200,000.00. Immediately prior to February 3, 1970, Bob E. L. Pope was the owner of such property subject to two security deeds. The first security deed was held by the defendant Stubbs to secure an indebtedness of $30,000.00 and the second security deed was held by the plaintiffs to secure an indebtedness of $163,500.00. Though the plaintiffs were unaware of it, Pope defaulted on his note to Stubbs on October 14, 1969, and in January of 1970 Stubbs commenced foreclosure proceedings.

Stubbs had actual knowledge of the existence of plaintiffs' security interest in the property, and actual knowledge of the names and addresses of the plaintiffs. In spite of such knowledge, Stubbs did not give notice to the plaintiffs of the foreclosure proceeding, although he did publish notice of the foreclosure in the Gwinnett Daily News as required by Georgia law. (Plaintiffs Joseph and Sam Giordano were residents of DeKalb County, Georgia, and plaintiff Josephine Giordano was a resident of Batavia, New York.)

Plaintiffs did not learn of the foreclosure until after it had taken place. As a result, the only person bidding at the foreclosure was an agent for the defendant Stubbs who bid in the property for Stubbs for $35,000.00, which amount was entirely consumed in paying the Stubbs indebtedness and costs of the foreclosure. Pope is insolvent and has subsequently defaulted on the note given to the plaintiffs.

Under Georgia law the effect of a foreclosure of a senior security instrument is to destroy all subordinate interests in the property. If the foreclosure is held to be valid, plaintiffs will have lost their security and any chance of realizing on the indebtedness to them.

Plaintiffs contended that if the Georgia foreclosure procedure, particularly Georgia Laws 1935, page 381, set out above, is sustained in these circumstances, the effect of such holding would be to deprive the plaintiffs of their property without due process of law. The Supreme Court of Georgia sustained a motion for summary judgment on behalf of the defendants and therefore, in effect, denied the plaintiffs' constitutional contentions.

Plaintiffs' constitutional contentions were presented to the Superior Court of DeKalb County in the Amended Complaint and by brief in opposition to the defendants' motion for summary judgment. When the Superior Court

of DeKalb County denied the motions for summary judgment made on behalf of all parties, it, apparently, found it unnecessary to rule upon the constitutional claim. Thereafter, the plaintiffs filed a notice of appeal to the Georgia Court of Appeals (which does not have jurisdiction over the constitutional claim) but the defendants filed notice of appeal to the Georgia Supreme Court. The cases in the Court of Appeals were transferred on the motion of the Court to the Georgia Supreme Court. Although the plaintiffs believed that the constitutional issue should not be decided by the Supreme Court of Georgia since it had not been decided by the trial court, the plaintiffs briefed the question in the Supreme Court of Georgia, as did the defendants. Briefly stated, the Plaintiffs relied upon **Mullane v. The Hanover Bank & Trust Co.**, 339 U.S. 306, 94 L.ed. 875 (1950), and cases following it, for the proposition that they were entitled as a matter of constitutional law to receive notice of the foreclosure in the circumstances of this case. Defendants relied, for the contrary proposition, principally upon **Scott v. Paisley**, 271 U.S. 636 (1925). Although the plaintiffs do not believe that the Supreme Court of Georgia should have passed upon the constitutional question, since it was not passed upon by the trial court, the effect of the decision of the Georgia Supreme Court is to conclude the case and thereby to deny the plaintiffs' constitutional claim. Apparently this was the intention of the Supreme Court of Georgia since it relied, in its opinion, upon **Scott v. Paisley**. See 228 Ga. 75, at 78.

The Federal Questions Are Substantial

The leading case is **Mullane v. Central Hanover Bank & Trust Company**, 339 U.S. 306, 94 L.ed. 875 (1950). In that case, a New York statute allowed a corporate trustee to settle accounts with regard to its administration of a common trust fund by filing a suit for the purpose. The statute provided that the only notice that had to be given to

persons interested in the fund was notice by publication for four successive weeks. The publication contained the name and address of the trust company, the name and date of establishment of the trust fund, and a list of participating estates, trusts or funds.

The Supreme Court held that this statutory procedure was violative of the due process clause of the Fourteenth Amendment. Mr. Justice Jackson, for the Court, noted that valuable property rights could be destroyed and, as a practical matter, without notice. Only chance, the Court said, brings a newspaper advertisement to the attention of all persons interested. The Court took notice of the necessity for establishing a procedure for settling the accounts of a common trust fund, but said that only a procedure that

> "one desirous of actually informing the absentee might reasonably adopt to accomplish it"

would satisfy the requirements of due process. Thus, the trustee was required at least to give notice by mail to those beneficiaries whose addresses were in its files. Insofar as the statute relieved it of this obligation it was unconstitutional.

The **Mullane** case has been cited and followed in a wide variety of circumstances.

Walker v. Hutchinson, 352 U.S. 112, 1 L.ed. 2d 178, 77 S.Ct. 200, was a case in which the City of Hutchinson condemned the petitioner's property, giving notice by publication. The Court, relying upon **Mullane**, held that this was a violation of due process. Mr. Justice Black, for the court, said:

> "It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In Mullane we pointed out

many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case, there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value." 352 U.S. at 116.

The state relied upon **Huling v. Kaw Valley R. and Improvement Co.**, 130 U.S. 559. The court pointed out that that was an 1889 case which upheld notice by publication in a condemnation proceeding on the ground that the landowner was a non-resident. Mr. Justice Black then said:

"Since appellant in this case is a resident of Kansas, we are not called upon to consider the extent to which Mullane may have undermined the reasoning of the Huling decision." 352 U.S. at 116.

In the case at bar two of the plaintiffs were residents of Georgia and the defendant Stubbs was aware of their interest in the property.

Covey v. Somers, 351 U.S. 141, 100 L.ed. 1021, 76 S.Ct. 724 (1956), involved a sale of a taxpayer's property for unpaid taxes. The taxpayer in this case received actual notice of the tax default and the impending sale of the property. However, she was incompetent and known to the city officials to be incapable of handling her property. This Court held that the sale of the property in these circumstances was unconstitutional. Relying upon **Mullane**, the court said:

"When notice is a person's due, process which is a mere gesture is not due process. The means em-

ployed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

New York v. New York, New Haven & Hartford Railroad Co., 344 U.S. 293, 97 L.ed 333, 73 S.Ct. 299 (1953), was a reorganization under the bankruptcy law. The city had a lien on the property of the railroad imposed for street, sewer and other improvements. The city was not given notice of the reorganization proceedings, except that it was published twice in five daily newspapers. This Court held that this was not adequate notice to cut off the city's lien rights. Relying upon **Mullane**, Mr. Justice Black, for a unanimous court, pointed out that notice by publication is a very poor substitute for actual service of process and its justification is difficult at best. He said that when names, interests and addresses of the persons are unknown, plain necessity may cause a resort to publication but unless there is some such necessity, actual notice is required.

Schroeder v. New York, 371 U.S. 208, 9 L.ed 2d 255, 83 S.Ct. 279, 89 A.L.R. 2d 1398 (1962), was a case in which the city of New York instituted proceedings to acquire the right to divert a river from its natural course. The city gave notice of the action pursuant to a statute which provided that notice would be published in two public newspapers in the city of New York and two public newspapers published in each other county in which any real estate affected was located. In addition, the city posted 22 notices along a few miles of riverbank, but did not give any other notice to property owners.

The statute provided that property owners affected could collect damages for the diversion and imposed a three year statute of limitations. After the expiration of the statute of limitations, the plaintiff filed a suit in equity contending that the notice was unconstitutional,

relying upon **Mullane**. The New York courts upheld the constitutionality of the act but this Court reversed. Mr. Justice Stewart for the unanimous court pointed out that in **Mullane** it was recognized that it is sometimes impossible to give personal notice and the examples given were missing or unknown persons. He then said:

> "The general rule that emerges from the Mullane case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." 371 U.S. at 212, 213.

Mr. Justice Stewart also referred to **New York v. New York, New Haven and Hartford Railroad Co.**, *supra*, where the court pointed out that:

> "Notice by publication is a poor and sometimes hopeless substitute for actual service of notice"

and that

> "its justification is difficult at best."

In **Sniadach v. Family Finance Corporation**, 395 U.S. 337, 23 L.ed 2d 349, 89 S.Ct. 1820 (1969), this Court held unconstitutional a Wisconsin law which provided for garnishment of wages on a pending suit. Mr. Justice Harlan, concurring, said that the debtor was being deprived of the use of the wages during the period between the garnishment and the conclusion of the main suit. He said that the use of the wages was property, of which a person may not be deprived without due process, and he cited the **Mullane** case in that connection.

Marin v. England, 385 U.S. 99, 17 L.ed 2d 197, 87 S.Ct. 274 (1966), involved a part of the bankruptcy act which provides that title to the property of the bankrupt is vested in the trustee on the date of filing of the petition.

A bank had honored checks after the date of filing of a bankruptcy petition but prior to receiving notice of it. This Court refused to give effect to the statutory provisions, and relied upon **Mullane**.

Mullane has general application to the whole subject of notice requirements to satisfy due process of law. As striking examples, consider the cases below outside the property field.

In **Armstrong v. Manzo**, 380 U.S. 545, 14 L.ed. 2d 62, 85 S.Ct. 1187 (1965), a husband and wife were divorced and custody of the child was awarded to the mother. Subsequently the wife married and she and her second husband brought an action for the child to be adopted by the second husband. Texas law provided that the adoption would have to be consented to by the natural father unless he had failed to contribute, commensurate with his ability, to the support of the child for two years. The husband and wife filed an affidavit that the first husband had not contributed to the support of the child and got the approval of the Court of Ordinary for the adoption. They gave no notice of any of it to the husband, although they knew his whereabouts, in Fort Worth. The adoption proceeding was in El Paso. The Texas court affirmed the procedure but the Supreme Court unanimously reversed, relying upon **Mullane**.

Lambert v. California, 355 U.S. 225, 2 L.ed. 2d 228, 78 S.Ct. 240 (1957). California law provided that it was unlawful for a person convicted of a felony to be or remain in Los Angeles for a period of more than five days without registering. Mrs. Lambert was convicted of violating this law but contended that she had no knowledge of the registration requirement. The Supreme Court reversed the conviction, saying the due process required that she have notice of the requirement. The Court cited **Mullane** in that connection.

In Re Gault, 387 U.S. 1, 18 L.ed. 2d 527, 87 S.Ct. 1428 (1967), the Supreme Court held that due process of law requires notice in writing of a juvenile court hearing "at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation." In this connection, it cited **Mullane**.

California v. Green, 399 U.S. 149, 26 L.ed. 2d 489, 90 S.Ct. 1930 (1970), discusses the right of the prosecution to use a witness's preliminary hearing testimony in connection with the accused's right of confrontation. Mr. Chief Justice Burger, concurring, cited **Mullane** in connection with the obligation of the prosecution to produce a witness. He said that a good faith effort to produce a witness was required.

The latest case that we find citing **Mullane** is **Williams v. Illinois**, 399 U.S. 235, 26 L.ed. 2d 586, 90 S.Ct. 2018 (1970), which held that it was unconstitutional to put an indigent in prison because he was unable to pay a fine. Mr. Justice Harlan, concurring in the result, said that he did not think "a state may, after declaring itself indifferent between a fine and jail, rely on the convenience of the latter as a constitutionally acceptable means for enforcing its interest, given the existence of less restrictive alternatives. Cf. **Mullane v. Central Hanover Trust Company.**"

For a comprehensive discussion of the subject as of 1957, see also Note, Requirements of Notice in In Rem Proceedings, 70 Harv. L. Rev. 1257 (1957).

It is necessary to make reference to **Scott v. Paisley**, 271 U.S. 632, 70 L.ed. 1123 (1926). That case upheld an earlier Georgia foreclosure procedure against a due process attack. The procedure under consideration did not require notice.

The case is distinguishable in that the plaintiff did not contend that there was any defense to the note involved,

and therefore she was not injured. Parties with different legal interests from those involved in the case at bar were contesting there.

Most important, however, it is quite clear that **Scott v. Paisley** applied ideas of due process which have been categorically rejected by later decisions of this Court. Our search reveals only one reference to it in later decisions of the Supreme Court. That was in **Security Mortgage Company v. Powers**, 278 U.S. 149, 73 L.ed 236 (1928), where **Scott v. Paisley** was mentioned in passing but was unimportant to the case which did not deal with the question of notice. Nor have we found any lower federal court decision relying upon **Scott v. Paisley** for any proposition other than that good title generally passes on a sale pursuant to a power, but not discussing the notice question. One such case (one of the two we found that was more recent than 1936) was **Young v. Ridley**, 309 F. Supp. 1308 (D.C. D.C., 1970), where the Court, however, took specific notice of a 30-day notice requirement present in that case which, of course, is a vital distinction. The other "modern" federal decision referring to **Scott v. Paisley** is **Admiral Company v. Thomas**, 164 F. Supp. 569 (D.C.D.C., 1958), where no constitutional question was raised.

It seems clear that **Scott v. Paisley** would not and should not be extended beyond its specific facts. It did not uphold the statutory provision involved in the case at bar and it is therefore no bar to the plaintiffs' recovery. However, if it is not distinguishable, **Scott v. Paisley** has been completely undermined by later cases and should be overruled.

CONCLUSION

For all these reasons, appellants submit that substantial federal questions are presented by the appeal which require plenary consideration, briefs on the merits, and oral argument for their resolution.

Respectfully submitted

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